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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 74
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Moosehead Breweries Limited
v.
Otto Brothers' Brewing Company, Inc.

Cancellation No. 25,256

James E. Shlesinger of Shlesinger, Arkwright & Garvey LLP
for Moosehead Breweries Limited.

John E. Reilly of The Reilly Intellectual Property Law
Firm, P.C. for Otto Brothers' Brewing Company, Inc.

Before Hairston, Chapman and Bucher, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Moosehead Breweries Limited (a corporation of
Canada) has filed a petition to cancel a registration on
the Principal Register issued to Otto Brothers' Brewing
Company, Inc. (a Wyoming corporation), for the mark MOOSE
JUICE for "beer."¹

¹ Registration No. 1,652,781, issued July 30, 1991, Section 8
affidavit accepted. The registration file record includes a
"Combined Sections 8 & 9 Declaration/Application" filed by Grand
Teton Brewing Co., Inc. on July 23, 2001. (There is no
assignment recorded at this Office.) If respondent ultimately
prevails in this case, then the registration file will be
forwarded to the Post Registration Branch of the USPTO for

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Petitioner asserts as grounds for cancellation² that it manufactures, and distributes and sells worldwide brewed alcoholic beverages, including beer that is sold throughout the United States; that petitioner has adopted and extensively and continuously used in commerce a family of "MOOSE" marks including MOOSEHEAD, MOOSE and the design of the head of a moose; that petitioner uses its "MOOSE" family of marks on and in connection with beer, clothing, and various other goods and services; that petitioner owns nine registrations which include the word MOOSE and/or the design of a moose head; that petitioner owns six pending applications, one of which (application Serial No. 75/249,274 for the mark THE MOOSE IS LOOSE for beers and ales) has been refused registration based on respondent's involved registration; that petitioner has used some of its "MOOSE" marks since long prior to respondent's claimed first use date of December 20, 1989; that petitioner's first use was at least as early as May 1, 1929, and its uses have been valid and continuous since the respective dates of first use; that long prior to respondent's stated first use

examination and review of the renewal application. The claimed dates of first use and first use in commerce are December 20, 1989 and February 12, 1991, respectively.

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date, petitioner adopted and did extensive business throughout the United States under the trade name MOOSEHEAD BREWERIES LIMITED; that petitioner's word mark MOOSEHEAD and its design of a moose head mark are famous marks; and that respondent's mark, when used on its goods, so resembles petitioner's previously used and registered marks, and family of "MOOSE" marks, as to be likely to cause confusion, mistake, or deception.³

In its answer respondent denied the salient allegations of the petition to cancel, and raised the affirmative defense that petitioner "is estopped to bring cancellation proceedings against Registrant by reason of the fact that it has never taken any steps to have the use by Registrant enjoined or to otherwise prevent the confusion which Petitioner alleges is caused by the use by registrant."

² Petitioner's motion to file an amended petition for cancellation was granted and the amended petition was accepted by Board order dated March 2, 1998.

³ Both petitioner's original and amended pleadings include a claim that respondent's mark "causes dilution of the distinctive quality of Petitioner's famous "MOOSEHEAD" and moose design marks." To whatever extent, if any, petitioner was asserting a claim of dilution under Sections 14 and 43(c), it cannot be entertained by the Board. Dilution became available as a ground for cancellation with the enactment of The Trademark Amendments Act of 1999 (with an effective date of August 5, 1999). The 1999 amendments apply only to applications filed on or after January 16, 1996. Because respondent's involved Registration No. 1,652,781 matured from an application filed on December 26,

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The record consists of the pleadings; the file of respondent's registration; the testimony upon written questions, with exhibits, of (i) Derek Oland, petitioner's chairman and chief executive officer, (ii) Paul H. McGraw, petitioner's vice president - finance and corporate

1989, there is a statutory bar to any assertion of dilution as a ground for cancellation.

secretary, and (iii) Andrew G. Oland, petitioner's marketing manager, U.S.A.; petitioner's notices of reliance on (i) the file history of its pending application Serial No. 75/249,274, (ii) copies of portions of several printed publications, and (iii) status and title copies of its nine pleaded registrations; respondent's testimony, with exhibits, of Charles Otto, respondent's president; petitioner's rebuttal testimony upon written questions, with exhibits, of Paul McGraw; and petitioner's rebuttal notice of reliance on the file history of another of its pending applications (Serial No. 75/512,219).

Both parties filed briefs on the case.⁴ Petitioner requested an oral hearing, but the parties subsequently filed a stipulated waiver of an oral hearing. Therefore, an oral hearing was not held.

Evidentiary Matters

Respondent has essentially objected to petitioner's entire record in this case, with the exceptions of

⁴ Petitioner's consented motion (filed July 18, 2001) to extend its time to file a reply brief by ten days to July 30, 2001 is granted. See Fed. R. Civ. P. 6(b). See also, Patent Rule 1.7, made applicable to trademark matters by Trademark Rule 2.1.

Petitioner's motion (filed July 30, 2001) for leave to file a reply brief that exceeds the 25-page limit (based on the numerous evidentiary objections made by respondent in its brief) is granted. See TBMP §538. Petitioner's reply brief is accepted and has been considered.

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petitioner's notice of reliance on status and title
copies of its pleaded registrations, petitioner's notice
of

reliance on its application for the mark THE MOOSE IS LOOSE for beers and ales which was refused registration based on respondent's involved registration, and petitioner's notice of reliance on the partial file history of petitioner's pending application for the mark MOOSE BREW for brewed alcoholic beverages.⁵ With few exceptions, respondent objected to almost all of the direct examination questions of petitioner's three testimony-in-chief depositions upon written questions (and all exhibits --1(a) through 1(p) and 2 through 25-- related thereto), and to most of the direct questions posed at petitioner's rebuttal deposition upon written questions. (Respondent did not specifically object to petitioner's exhibit Nos. 26 and 27 introduced during the McGraw rebuttal testimony, but respondent did object to the questions wherein the witness was asked to identify those exhibits.) In its brief respondent renewed its objections, addressing them in five separate sections under the title "Evidentiary Matters" (pp. 7-24). Respondent's objections are generally based on relevancy, hearsay, lack of foundation, lack of specifics as to time

⁵ We note that respondent did file a motion to strike petitioner's notice of reliance on the partial file history of one of its applications. In an April 10, 2001 Board order thereon, the Board stated "Respondent's motion to strike is denied as frivolous"

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frame, product, etc., lack of supporting documentary evidence, and improper

rebuttal. Petitioner's reply brief is devoted solely to addressing respondent's evidentiary objections.

We find that in the main respondent's objections are not well taken. While we have not addressed each objection to each question and to each exhibit separately, we emphasize that we have considered the record in light of the objections, and all appropriate evidence has been considered for the probative value it may have.

The Parties

Petitioner, located in Canada, is a manufacturer and distributor of beer, which it sells in Canada, in all 50 states of the United States, and throughout many countries around the world. Started in the 1860s under the name Army & Navy Brewery, later changed to S. Oland Sons & Co., and eventually to Moosehead Breweries Limited, it first produced MOOSEHEAD PALE ALE in 1928 (when it purchased a brewery which made MOOSEHEAD beer) and it first sold its beer in the United States in 1974, but its major launch in the United States occurred in 1978. Since 1978, petitioner has continuously sold beer in the United States under the mark MOOSEHEAD CANADIAN LAGER BEER and design; and although not currently doing so, it has sold also beer under the marks MOOSEHEAD LIGHT

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and MOOSEHEAD ICE. The mark THE MOOSE IS LOOSE was a tag line used in conjunction with the major launch of the beer in the United States in the late 1970s and into early 1980s.

In conjunction with promoting the beer, petitioner also sells numerous other goods under its MOOSEHEAD marks, including, t-shirts, caps, jackets, sweatshirts, coffee mugs, beer mugs, coasters, trays, playing cards, beach towels, patio umbrellas, wrist watches and bumper stickers. T-shirts sold under the MOOSEHEAD marks have been available since 1978. Further, petitioner operates MOOSEHEAD Country Stores in three Canadian locations, including one in St. Stephen, New Brunswick, which is located just over the border from Maine.

Petitioner has sold about \$700 million worth of MOOSEHEAD brand beer in the United States. It advertises its beer (and related products) in numerous print and broadcast media, through in-store promotions (e.g., displays at end aisles in supermarkets), onsite at bars and pubs with signs, coasters and various events such as THE MOOSE IS LOOSE night, and celebrity promotions such as sponsoring the Dinah Shore golf tournament and the Colorado Ski Team, as well as Willie Nelson wearing a MOOSEHEAD t-shirt in the movie "Honeysuckle Rose." In

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advertising and promoting the marks, petitioner works closely with its importer and about 500 distributors in the United States. Petitioner spent approximately \$98,300 on advertising and promotional costs in 1978 in the United States, and for the period late fall 1997 through 1998, that had grown to approximately \$4 million dollars (in the United States) on consumer advertisements as well as trade advertisements. In the ten months prior to March 1998, petitioner had 80,000-90,000 "hits" on its website, about 40% of which were from the United States.

Petitioner's witnesses testified that while they were aware of some other uses of "MOOSE" marks for beer (e.g., "Stupid Moose," "Moosehead Brown Ale," "Moose Juice," and "Moose Drool"), the first two have ceased use and one is this registrant, and that petitioner is prepared to take action against anyone infringing its trademarks.

The brothers, Charles and Ernest Otto, incorporated respondent, Otto Brothers' Brewing Company, Inc. in Wyoming in 1987 and respondent is a micro-brewery (i.e., a brewery that produces 15,000 or less barrels of product per year). Respondent's first use of the mark MOOSE JUICE on beer was December 20, 1989 and its use has been continuous. According to Charles Otto, micro-brewed

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products are sold more in their region of origin, are marketed to a higher-end consumer, and generally cost more than domestic products.⁶

Respondent's total advertising and promotional expenses for the years 1992 through 1996 are almost \$47,000⁷, and its sales for the same time period are about \$218,000⁸. The advertisements are generally run in a variety of newspapers and magazines in the local area of the Rocky Mountains, and in publications related to regional beer festivals.

Mr. Otto testified that he was aware of (i) several third-party uses of marks which include the word "MOOSE" for alcoholic and non-alcoholic beverages, (ii) several bars with "MOOSE" as part of their name, such as "Mangy Moose Saloon," (iii) organizations that sell alcoholic beverages that use the word "MOOSE" in conjunction with

⁶ Respondent's comparison is to "domestic beers" brewed in the United States. Because petitioner's goods are brewed in Canada and then imported into the United States, they would fall into the category of "imported beers."

⁷ Charles Otto testified that the total advertising figures include all three of respondent's brands of beer -- TETON ALE, OLD FAITHFUL ALE and MOOSE JUICE STOUT; that the figures could not be separated out for each brand; and that these products are often advertised together.

⁸ Mr. Otto testified that the sales of all three brands totaled about \$727,000, with sales of MOOSE JUICE beer comprising about 25-30% of that number; and that TETON ALE is the "best-seller" of all of respondent's products.

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their organization, such as the Loyal Order of Moose, and
(iv) the Moosehead Lake Region of Maine.

Standing

The status and title copies of several of
petitioner's pleaded registrations for marks such as
MOOSEHEAD and the design of a moose head for beer and
related brewed alcoholic beverages, as well as the file
history of petitioner's

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application Serial No. 75/249,274 showing that petitioner's application was refused registration based on the involved Registration No. 1,652,781, establish petitioner's standing. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 1307, 55 USPQ2d 1842 (Fed. Cir. 2000). Respondent did not contest petitioner's standing.

Priority

Although petitioner owns several registrations, priority must be proven in a cancellation proceeding. See *Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, at 1283-1284 (TTAB 1998). In this case, petitioner has established continuous use in the United States of the mark MOOSEHEAD CANADIAN LAGER BEER and design (including a design of a moose head) mark for beer since 1978, which is well before respondent's proven use of the mark MOOSE JUICE in December 1989. Thus, petitioner has established priority with respect to that mark for beer and brewed other alcoholic beverages.

Moreover, petitioner submitted proper status and title copies of its nine pleaded registrations under a timely notice of reliance filed in October 1998. In this regard, when a registration owned by a party has been properly made of record in an inter partes case, and there are changes in the status of the registration

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between the time it was made of record and the time the case is decided, the Board will take judicial notice of, and rely upon, the current status of the registration as shown by the records of the Patent and Trademark Office. See TBMP §703.02(a), and the cases cited therein. The Board hereby takes judicial notice of the current status of six of the nine registrations on which either a Section 9 renewal or a Section 8 initial affidavit of use became due during the interim time frame.⁹

Petitioner submitted status and title copies of the following registrations for alcoholic beverages:

(1) Registration No. 1,198,187, for the mark shown below



⁹ Specifically, the status and title copies of five of the above-identified registrations (Reg. Nos. 1,198,187; 1,217,629; 1,597,390; 1,598,511; and 1,621,134) submitted with petitioner's notice of reliance were prepared by the U.S. Patent and Trademark Office in October 1998, and therefore do not include information as to the Section 9 renewal affidavits, which were due subsequent to October 1998. Likewise, with regard to one registration (No. 2,100,821, the status and title copy did not

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for "beer and lager"¹⁰;

(2) Registration No. 1,511,184 for the mark MOOSEHEAD for "beer"¹¹;

(3) Registration No. 1,514,776, for the mark shown below



for "beer"¹²;

(4) Registration No. 1,527,256, for the mark shown below



include information as to the Section 8 subsequently due thereon.

¹⁰ Reg. No. 1,198,187, issued June 15, 1982, Section 8 affidavit accepted, Section 15 affidavit acknowledged, combined Section 9 and 8 affidavits filed (awaiting examination). The words "Canadian Lager Beer" are disclaimed. The registration includes a statement that the stippling and shading shown in the drawing is a feature of the mark and does not indicate color. The claimed date of first use is April 22, 1978.

¹¹ Reg. No. 1,511,184, issued November 1, 1988, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is May 1, 1929.

¹² Reg. No. 1,514,776, issued November 29, 1988, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The words "Canadian Beer" and "Light" are disclaimed. The registration includes a statement that the lining in the drawing is a feature

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for "beer"¹³; and

(5) Registration No. 2,100,821, for the mark MOOSE for "brewed alcoholic beverages, namely, beer, ale, stout and lager."¹⁴

In addition, petitioner submitted status and title copies of the following registrations for goods other than alcoholic beverages:

(1) Registration No. 1,217,629, for the mark shown below



for "shirts"¹⁵;

of the mark and does not indicate color. The claimed date of first use is September 17, 1987.

¹³ Reg. No. 1,527,256, issued February 28, 1989, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The registration includes a statement that the lining in the drawing is for shading purposes only and does not indicate color. The claimed date of first use is April 22, 1978.

¹⁴ Reg. No. 2,100,821, issued September 30, 1997, Section 8 affidavit accepted, Section 15 affidavit acknowledged. This registration is based on Sections 44(d) and (e), Canadian Registration No. TMA285467.

¹⁵ Reg. No. 1,217,629, issued November 23, 1982, Section 8 affidavit accepted, Section 15 affidavit acknowledged. The claimed date of first use is July 31, 1979. The somewhat unreadable wording appearing in this mark reads as follows: Brewed & Bottled by Moosehead Breweries Limited Canada's Oldest Independent Brewery; 12 fl oz.; and Saint John, New Brunswick & Dartmouth, Nova Scotia, Canada.

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(2) Registration No. 1,597,390, for the mark shown below



for "posters, banners, bar signs and crests made of paper" in International Class 16, "tote bags" in International Class 18, "drinking glasses, mugs, serving trays, plastic cups, insulated beverage holders, and portable insulated containers for food and beverage" in International Class 21, and "clothing, namely, sweaters, football jerseys, mesh ball caps, winter ball caps, painter hats, aprons, golf shirts, sports shirts, t-shirts, long john shirts, $\frac{3}{4}$ ball shirts, hockey sweaters, cowboy hats" in International Class 25¹⁶;

(3) Registration No. 1,598,511, for the mark MOOSEHEAD
for

¹⁶ Reg. No. 1,597,390, issued May 22, 1990, Section 8 affidavit (partial - "posters" and "tote bags" were not included in the affidavit) accepted, Section 15 affidavit acknowledged, renewed (10 years). This registration is based on Sections 44(d) and (e), Canadian Registration No. 360450. The registration includes a statement that the lining in the drawing is a feature of the mark and does not indicate color.

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virtually identical goods to those listed above in
Registration No. 1,597,390¹⁷; and

(4) Registration No. 1,621,134, for the mark THE MOOSE IS
LOOSE for "posters, bumper stickers and windshield
stickers made of paper, playing cards, decals and pens"
in International Class 16, "tote bags, golf umbrellas,
and patio umbrellas" in International Class 18, "portable
insulated containers for food and beverages, bottle
openers, beer mugs, coffee mugs, pewter beer mugs,
drinking cups and glasses, and plastic beer cups," in
International Class 21, and "clothing, namely, aprons,
ball caps, painter hats, summer mesh hats, summer stripe
hats, winter corduroy hats, and sun visors, shirts, polo
shirts, sweatshirts and t-shirts, socks, baseball
uniforms, hockey uniforms, and football jerseys,
neckties, sweaters, and jackets" in International Class
25.¹⁸

Likelihood of Confusion

¹⁷ Reg. No. 1,598,511, issued May 29, 1990, Section 8 affidavit
(partial - the item "tote bags" was not included in the
affidavit) accepted, Section 15 affidavit acknowledged, renewed
(10 years). This registration is based on Sections 44(d) and
(e), Canadian Registration No. 357860.

¹⁸ Reg. No. 1,621,134, issued November 6, 1990, Section 8
affidavit (partial -- all the goods in International Classes 18
and 21 were not included in the affidavit) accepted, Section 15
affidavit acknowledged, renewed (10 years). This registration
is based on Sections 44(d) and (e), Canadian Registration No.
364664.

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We now turn to the issue of likelihood of confusion. Our determination of likelihood of confusion must be based on our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Based on the record before us in this case, we find that confusion is likely.

Turning first to consideration of the parties' respective goods, respondent's identification of goods is set forth as "beer," and petitioner's registered marks are for goods identified as "beer," "beer and lager," and

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"brewed alcoholic beverages, namely, beer, ale, stout and lager."¹⁹ Thus, the parties alcoholic beverage goods are in part identical (beer), and are otherwise very closely related. Obviously, identical goods are offered through all the same channels of trade to similar potential purchasers, which in this case is the general public. Respondent's testimony regarding its micro-brewed beer and the targeted consumers thereof is unavailing because there are no restrictions or limitations of any kind on its goods identified as simply "beer". See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Moreover, when products are low priced and subject to impulse buying, the risk of likelihood of confusion increases because purchasers are held to a lesser standard of purchasing care. See *Recot, Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1894 (Fed. Cir. 2000).

¹⁹ As discussed previously in this decision, petitioner also owns registrations for various collateral goods (e.g., posters, bumper stickers, bar signs, pens, playing cards, shirts, sweaters, hats, drinking glasses, mugs), specifically associated with its brewed alcoholic beverages. However, we have focused in this case on the brewed alcoholic beverages made and sold by both parties.

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Our primary reviewing Court has stated "[w]hen marks would appear on virtually identical goods or services, the

degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

With that in mind, we turn to a consideration of the similarities/dissimilarities between the marks. First, we consider petitioner's contention that it owns a family of marks characterized by the word MOOSE. The "family" of marks doctrine has applicability in those situations where, prior to a defendant's first use of its challenged mark containing a particular feature, the plaintiff had established a family of marks characterized by that feature, so that the defendant's subsequent use of its mark containing the feature for goods or services which are similar or related to plaintiff's will cause the relevant purchasing public to assume that defendant's mark is yet another member of plaintiff's family. See *Blansett Pharmacal Co. Inc. v. Carmrick Laboratories Inc.*, 25 USPQ2d 1473, 1477 (TTAB 1992); and *Econo-Travel Motor Hotel Corp. v. Econ-O-Tel of America, Inc.*, 199 USPQ 307 (TTAB 1978). It is well settled that merely adopting, using and registering a group of marks having a feature in common (e.g., the term MOOSEHEAD, the design

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of a moose head²⁰) for similar or related goods or services is insufficient to establish, as against a defendant, a claim of ownership of a family of marks characterized by the feature. Rather, it must be demonstrated that prior to defendant's first use of its challenged mark, the various marks said to constitute the plaintiff's family, or at least a good number of them, were used and promoted together in such a manner as to create among purchasers an association of common ownership based upon the family characteristic. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Witco Chemical Co. v. Whitfield Chemical Co.*, 418 F.2d 403, 164 USPQ 43 (CCPA 1969); *Hester Industries Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1646 (TTAB 1987); and *Dan River, Inc. v. Apparel Unlimited, Inc.*, 226 USPQ 186 (TTAB 1985).

Certainly, petitioner's overall mark shown below



²⁰ Petitioner contends its family of "moose" marks is made up of not only those marks which include the term MOOSE but also those which include the design of a moose.

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establishes that petitioner uses the word mark MOOSEHEAD together with its "design of a moose head" mark. However, petitioner has generally failed to prove the specifics of promotion and/or use of its various "MOOSE" marks (e.g., MOOSEHEAD, THE MOOSE IS LOOSE, MOOSE) together as a family of marks; and in particular, petitioner has failed to establish that such use by petitioner was prior to defendant's proven first use in December 1989. Many of petitioner's exhibits showing several of its "MOOSE" family of marks used together were uses subsequent to defendant's first use. Because petitioner's evidence is insufficient to show that petitioner established a family of "MOOSE" marks prior to respondent's first use, the issue of likelihood of confusion must be determined by comparing respondent's mark with each of petitioner's registered marks considered individually.

As explained previously, in our analysis of the similarities/dissimilarities of the many involved goods, we focused on "beer," "lager," "stout," and "ale," without considering the many collateral goods on which petitioner uses its marks. Likewise, in our analysis of the numerous asserted marks of petitioner, we will focus essentially on the most pertinent marks, MOOSEHEAD and

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MOOSEHEAD CANADIAN LAGER BEER and design (including the design of a moose head).

While petitioner's marks MOOSEHEAD and MOOSEHEAD CANADIAN LAGER BEER and design, and respondent's mark MOOSE JUICE, are not identical, they are similar in sound, appearance, connotation and commercial impression. It is not improper to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987).

The word MOOSE is the dominant feature and theme of both parties' marks. It connotes the same hoofed animal for both parties. To the extent it may connote "the great outdoors," again the connotation is the same for both parties. Moreover, it is the first part of a mark which is most likely to be impressed upon the mind of a purchaser and be remembered by the purchaser. See *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Purchasers will likely remember MOOSE even if they do not necessarily remember the following portions. In fact, the minor differences in the marks

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may not be recalled by purchasers or users seeing the marks at separate times. The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of the many trademarks encountered; that is, the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992).

Purchasers, upon seeing respondent's mark MOOSE JUICE used on beer, would assume that respondent's goods come from the same source as petitioner's beer, or are sponsored by or associated with petitioner.

Further, respondent has chosen to display its mark MOOSE JUICE in a manner with several similarities to that of petitioner. Although we do not ordinarily look to the trade dress of a word mark in determining the issue of likelihood of confusion, we cannot help but note in this case that in addition to carrying the words MOOSE JUICE, respondent's trade dress has numerous similarities to that of petitioner, including use of the color green, the

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oval/circular design with an outside band, a banner crossing the oval/circular design near the bottom third of same, wording appearing within the banner, and the design of a moose. See *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992); and *Specialty Brands Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984).

Overall, we find respondent's mark MOOSE JUICE similar to petitioner's marks MOOSEHEAD and MOOSEHEAD and design in sound, appearance, connotation and commercial impression.²¹

Another du Pont factor we consider in this case is the strength of petitioner's marks.²² Petitioner has clearly demonstrated that its marks MOOSEHEAD and MOOSEHEAD CANADIAN LAGER BEER and design are very strong and well-known in the beer business. In particular, petitioner has engaged in selling brewed alcoholic beverages in the United States since 1978, and it has

²¹ Respondent argued that petitioner's mark MOOSEHEAD is weak because it is a geographic term and conveys a geographic connotation. While the record shows there is a Moosehead Lake, Maine, the record is devoid of evidence that the relevant purchasing public perceives the marks MOOSEHEAD and MOOSEHEAD CANADIAN LAGER BEER and design as geographic terms relating thereto.

achieved significant sales in the United States, with substantial sums spent on advertising. Petitioner also introduced numerous media stories published about petitioner, its history, and its business. There is no question that petitioner's launch of MOOSEHEAD beer in the United States was highly successful. However, outside of the sales and advertising expenditures, much of the evidence relating to the asserted fame of petitioner's marks dates from the time frame much closer to that launch than to the present (e.g., "Fortune," November 5, 1979; sponsorship of the Dinah Shore golf tournament). Some of the media stories are from trade journals for the brewing industry, and some are in Canadian publications. Thus, even though petitioner testified that all but two of the Canadian publications are distributed in the United States, there is no information concerning the extent of that distribution or to whom they are distributed in the United States. There is essentially no evidence from consumers about recognition of the petitioner's marks, particularly, MOOSEHEAD and MOOSEHEAD CANADIAN LAGER BEER and design. There is no evidence that several of petitioner's marks,

²² Petitioner only pleaded that two of its marks, "MOOSEHEAD" and "moose design," are famous. Paragraphs 14-15 of the amended petition to cancel.

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including the design of a moose head, MOOSE, and THE MOOSE IS LOOSE, are by themselves, recognized by the purchasing public as famous marks. Petitioner's stores in Canada no doubt receive customers who come from the United States, but there is no specific breakdown of information along those lines. We are left to speculate as to the actual impact of petitioner's involved marks on the minds of consumers. See *Fossil Inc. v. Fossil Group*, 49 USPQ2d 1451, 1457 (TTAB 1998); and *General Mills Inc. v. Heath Valley Foods*, 24 USPQ2d 1270, 1277 (TTAB 1992).

We are reluctant to treat petitioner's pleaded marks as "famous" on the record before us. However, we do not hesitate to find that petitioner's marks MOOSEHEAD and MOOSEHEAD CANADIAN LAGER BEER and design are well-known marks for beer and other brewed alcoholic beverages, and are thus entitled to a broad scope of protection. See *Cunningham v. Laser Golf Corp.*, supra; and *Henry Siegel Co. v. M & R International Mfg. Co.*, 4 USPQ2d 1154, 1161 (TTAB 1987).

Another du Pont factor to be considered in this case is the number and nature of similar marks in use for similar goods. Respondent contends that its witness, Mr. Charles Otto, testified that there are bars, breweries and organizations using the term "moose" in their marks

or names; and that petitioner's witnesses' testimony regarding its alleged "policing" of its marks is inadmissible hearsay. Conversely, petitioner contends that Mr. Otto merely testified that he had "heard of" several trademarks used by third parties that include the word "moose," and he then named some that "come to mind" (dep., p. 19); that petitioner has undertaken policing efforts against the use by others of marks including the term "moose"; and that there is no evidence of any unchallenged uses of third-party marks.

While both parties' testimony on this point has been considered, we note that Mr. Otto's memory of seeing a few marks with "moose" as part of the mark does not establish significant third-party uses of which the purchasing public is clearly aware. Moreover, petitioner established that the third-party "moose" marks recalled by respondent's witness have generally been successfully contested by petitioner, with some challenges still pending.

The Board has in the past given weight to credible and probative evidence of widespread, significant and unrestrained use by third parties of marks containing elements in common with the mark which is the subject of the petition to cancel on grounds of likelihood of

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confusion to demonstrate that confusion is not, in fact, likely. See *Hilson Research Inc. v. Society For Human Resource Management*, 27 USPQ2d 1423, 1431 (TTAB 1993), citing *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1462 (TTAB 1986, amended 1987). In the case now before us, respondent's evidence of third-party uses is minimal, consisting solely of Mr. Otto's testimony that he recalled some marks including the term "moose" used for beer products, some organizations with "MOOSE" as part of their names, and one bar with "moose" in its name. The names of various organizations (e.g., Fraternal Order of Moose, Loyal Order of Moose) are not relevant to the use of the term "moose" on brewed alcoholic products. With regard to the asserted third-party uses of "moose" on beer products, it is clear that petitioner has successfully challenged many of those marks, while some others remain involved in pending challenges. There is certainly no showing of widespread, significant and unrestrained third-party use in this case.

Finally, the lack of actual confusion is not a factor weighing heavily against petitioner. The record shows that respondent has had minimal sales of its product during a seven year period (\$150,000 from 1991-

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1997), and it sells its beer in, at most, eleven states. Thus, there has been neither significant overlap nor significant opportunity for actual confusion. Moreover, we are not convinced that purchasers of beer are likely to complain about confusion as to the source thereof. In any event, instances of actual confusion are not necessary to prove the issue of likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

In view of the similarities of the marks; the strength of petitioner's marks; the identical and closely related goods; identical trade channels and identical potential purchasers; and the conditions under which and the buyers to whom sales of beer products are made, we find that there is a likelihood that the purchasing public would be confused when respondent uses MOOSE JUICE as a mark for beer.

Laches

Respondent contends that petitioner is guilty of laches as there was a substantial delay by petitioner, after constructive notice of respondent's mark, in asserting any potential rights in petitioner's mark against respondent's mark. (Brief, pp. 40-42.)

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Respondent bears the burden of proving its asserted affirmative defense. In order to prevail on this affirmative defense, respondent must establish that there was unreasonable and unexcused delay by petitioner in asserting its rights, and material prejudice to respondent resulting from the delay. See *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); and *Lincoln Logs Ltd. v. Lincoln Pre-Cut Homes, Inc.*, 971 F.2d 732, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992). Laches is an equitable defense measured by delay weighed against the resulting prejudice to respondent. Mere delay alone does not necessarily result in conditions sufficient to support a defense of laches. Rather, there must also have been some detriment due to the delay. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §20:76 (4th ed. 2000).

In this case, the record shows the following: respondent's involved mark was published for opposition in September 1990; the registration issued as Registration No. 1,652,781 on July 30, 1991; petitioner filed its petition to cancel on July 12, 1996; and petitioner did not contact respondent prior to filing the petition to cancel (Otto dep., pp. 27-28). Thus,

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petitioner delayed about five and one-half years before taking action against respondent's registration for the mark MOOSE JUICE. However, respondent did not argue in its brief, and there is no evidence regarding any specific reliance by respondent on petitioner's silence, any actions taken by respondent based on petitioner's silence, or any prejudice to respondent due to petitioner's failure to proceed against respondent until the filing of the petition to cancel. Respondent asserts only that petitioner did not act against this registration for more than five years from the date the application was published for opposition.

On cross examination of Mr. Otto, petitioner established that respondent admitted in its response to petitioner's request for admission No. 18 that for the seven years 1991 through 1997, respondent's dollar amount of sales for beer products sold under the mark MOOSE JUICE was less than \$150,000; that the geographic extent of respondent's use of its mark extended to, at most, 11 states; and that respondent has ceased selling beer in Michigan (Otto dep., pp. 32-34.) Thus, it appears respondent's business under this mark is declining rather than expanding.

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Moreover, petitioner's witness, Mr. McGraw, testified that petitioner did not become aware of respondent's mark until it conducted, as a normal part of its business (which it does on a continuing basis), a search for availability of marks in 1995 or 1996, and that petitioner "immediately" contacted its trademark attorneys to deal with the situation (First McGraw dep., pp. 9-10), with the petition filed shortly thereafter.

We do not find on this record that five to six years is an inordinate time delay. The petition to cancel was filed within (albeit near the close of) the five year time period allowed under Section 14(1) of the Trademark Act for a petition to cancel based on a claim of priority and likelihood of confusion. Respondent has not proven any prejudice attributable to the delay. For all of the above reasons, respondent has not established that justice requires petitioner's claim be barred, and respondent's defense of laches fails. See *Charrette Corp. v. Bowater Communication Papers Inc.*, 13 USPQ2d 2040 (TTAB 1989).

Decision: The petition to cancel is granted, and Registration No. 1,652,781 will be cancelled in due course.